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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

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DATE COMPLAINT FILED: 08/04/04

DATE OF NOTIFICATION: 08/11/04

DATE ACTIVATED: 05/10/05

STATUTE OF LIMITATIONS: August 3, 2009

COMPLAINANT:

Lori Glasser

RESPONDENTS:

Emily's List and Britt Cocanour, in her official capacity as treasurer¹

Florida Women Vote! – A Project of Emily's List Campaign for Florida's Future, formerly known as Betty Castor for U.S. Senate, and William R. Lewis, in his official capacity as treasurer²

RELEVANT STATUTES:

2 U.S.C. § 441a

11 C.F.R. § 100.29

11 C.F.R. § 109.21

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

Internal Revenue Service

I. INTRODUCTION

This matter involves alleged coordination between Betty Castor, a 2004 Senate candidate in Florida, and Emily's List, a political action committee. Emily's List is registered with the Commission as a multicandidate political committee and supports Democratic, pro-choice female candidates. Emily's List endorsed Castor and, apparently, actively supported her.³ Castor won a

¹ At the times relevant to the complaint allegations, Joseph Solmonese served as the treasurer for Emily's List.

² At the times relevant to the complaint allegations, Charles L. Lester served as the treasurer for Betty Castor for U.S. Senate, Betty Castor's principal campaign committee. Earlier this year, the committee changed its status to a multicandidate committee under the name Campaign for Florida's Future fka Betty Castor for U.S. Senate and changed its treasurer to William R. Lewis.

³ See, e.g., Anita Kumar, *Castor's ties to group draw fire*, St. Petersburg Times, July 18, 2004.

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1 highly contested Democratic Primary in August but lost a close General Election in November to
2 Mel Martinez.

3 Complainant Lori Glasser alleges that Emily's List and "Florida Women Vote! – A
4 Project of Emily's List" made excessive contributions to Betty Castor for U.S. Senate ("Castor
5 Committee") in the form of coordinated television advertisements. The complaint alleges that
6 the coordination of the television advertising is evidenced by frequent contacts between Emily's
7 List and the Castor Committee, the Castor Committee's employment of a former Emily's List
8 employee, the withdrawal of television advertisements by Castor in locations where Emily's List
9 ads aired, and Castor's public acknowledgment of the help Emily's List gave to her campaign.
10 The Castor Committee and Emily's List separately deny that the advertisements were coordinated
11 despite frequent contacts between the two committees.

12 As more fully set forth below, this Office recommends that the Commission find no
13 reason to believe that Emily's List made, or that the Castor Committee knowingly received,
14 excessive contributions in the form of coordinated television advertisements. Furthermore,
15 because Florida Women Vote! – A Project of Emily's List appears not to be a separate legal
16 entity but merely a program within Emily's List, this Office recommends that the Commission
17 dismiss the complaint as to Florida Women Vote! – A Project of Emily's List.

18 **II. FACTUAL SUMMARY AND LEGAL ANALYSIS**

19 A payment for a coordinated communication is an in-kind contribution to the candidate's
20 authorized committee with which it is coordinated and must be reported as an expenditure made
21 by that candidate's authorized committee. 11 C.F.R. § 109.21(b)(1). In addition, as an in-kind
22 contribution, the costs of a coordinated communication must not exceed a political committee's
23 applicable contribution limits. *See* 2 U.S.C. § 441a.

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1 To determine whether a communication is coordinated, 11 C.F.R. § 109.21 sets forth a
2 three-pronged test: (1) the communication must be paid for by a person other than a Federal
3 candidate, a candidate's authorized committee, or political party committee, or any agent of any
4 of the foregoing; (2) one or more of the four content standards set forth in 11 C.F.R. § 109.21(c)
5 must be satisfied; and (3) one or more of the six conduct standards set forth in 11 C.F.R.
6 § 109.21(d) must be satisfied. *See* 11 C.F.R. § 109.21(a). This Report will discuss each prong in
7 turn.

8 **A. Payment Prong**

9 The payment prong of the coordination regulation, 11 C.F.R. § 109.21(a)(1), is clearly
10 satisfied. Emily's List admits that its Florida Women Vote! project paid for the advertisements
11 alleged to have been coordinated. *See* Emily's List Response ("EL Response"), at 2.

12 **B. Content Prong**

13 The content prong is satisfied if the communications at issue meet at least one of four
14 content standards: (1) a communication that is an electioneering communication as defined in
15 11 C.F.R. § 100.29(a); (2) a public communication that republishes, disseminates, or distributes
16 candidate campaign materials; (3) a public communication containing express advocacy; or (4) a
17 public communication, in relevant part, that refers to a clearly identified federal candidate, is
18 publicly distributed or disseminated 120 days or fewer before a primary or general election, and
19 is directed to voters in the jurisdiction of the clearly identified candidate. *See* 11 C.F.R.
20 § 109.21(c).⁴

⁴ In *Shays v. FEC*, No. 04-5352 (D.C. Cir. July 15, 2005), the Appellate Court affirmed the District Court's invalidation of the fourth "public communication" content standard of the coordinated communications regulation. The District Court had remanded the matter back to the Commission, but in a ruling subsequent to the remand, the District Court explained that the "deficient rules technically remain 'on the books,'" pending promulgation of a new regulation. *Shays v. FEC*, 340 F. Supp. 2d 39, 41 (D.D.C. 2004). This Office believes that despite the Appellate Court ruling, the public communication standard is still in effect until a new standard is promulgated, particularly in cases like this where the standard, held to be underinclusive, is met.

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1 Although the complainant did not provide copies of any ads or transcripts, and this Office
2 has not been able to locate any through publicly available information, one or more Emily's List
3 advertisements may nevertheless meet the fourth content standard. First, the complaint was filed
4 on August 4, 2004, 27 days before the August 31 primary, and noted that the advertisements at
5 issue were "recently purchased television advertising" in Jacksonville, Orlando, and Gainesville,
6 indicating that the advertisements aired within the 120-day time frame set forth in the fourth
7 content standard. See Complaint, at 2-3. Moreover, news reports indicate that Emily's List ads
8 clearly referring to Castor started airing in several parts of Florida on August 3,⁵ and that an
9 Emily's List ad criticizing Martinez aired in October, within 120 days before the November 2,
10 2004 General Election.⁶ Finally, in their responses, the Castor Committee and Emily's List
11 neither admit nor deny that the ads satisfy the content prong of the coordination regulation.⁷

12 It appears that the content prong of the coordination regulation may be satisfied, as one or
13 more Emily's List advertisements likely constitute a public communication that referred to a
14 clearly identified federal candidate, was publicly distributed or disseminated 120 days or fewer
15 before a primary or general election, and was directed to voters in the jurisdiction of the clearly
16 identified candidate. Accordingly, we now turn to an analysis under the conduct prong.

⁵ See, e.g., Steve Bousquet and Anita Kumar, *TV likely to be kingmaker in GOP Senate race*, The St. Petersburg Times Online, Aug. 10, 2004; Ken Thomas, *EMILY criticism deepens*, The Associated Press, Aug. 3, 2004 (describing ad as touting Castor's health insurance program for low-income children); Anita Kumar and Steve Bousquet, *Martinez, Castor foes claim campaign fouls*, The St. Petersburg Times Online, Aug. 3, 2004 (describing ad as focusing on Castor's views on health care); Beth Reinhard, *Florida candidates assailed*, Miami Herald, Aug. 3, 2004 (describing ad as focusing on health insurance program started by Castor).

⁶ See, e.g., Brendan Farrington, *Martinez Calls On Castor To Pull Al-Arian Ad*, Associated Press, Oct. 13, 2004 (describing ad as criticizing Martinez on stem cell research, health care and the minimum wage).

⁷ The Castor Committee states that because the conduct prong is not met, the content prong need not be examined. It further states that it only has some recollection of seeing the ads on television but does not know their content exactly and would want to be provided with copies if the Commission were to pursue this matter further. See Castor Committee Response ("CC Response"), at 2, n. 2.

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C. Conduct Prong

The Commission's regulations set forth six types of conduct between the payor and the committee, whether or not there is agreement or formal collaboration, that can satisfy the conduct prong. *See* 11 C.F.R. § 109.21(d). Only four of these standards are relevant here.⁸ The first three standards – (1) request or suggestion, (2) material involvement, and (3) substantial discussion – do not appear to be met, and the respondents sufficiently rebut the allegations that are made. Finally, the former employee standard does not appear satisfied, as the complaint does not identify any former employees of the Castor campaign who may have been involved in the creation, production, or distribution of the advertisements at issue.

1. Request or suggestion, material involvement, substantial discussion

Under the first standard, the communication is coordinated if it is created, produced, or distributed at the request or suggestion of a candidate or an authorized committee, or if the communication is created, produced, or distributed at the suggestion of the payor and the candidate or authorized committee assents to the suggestion. *See* 11 C.F.R. § 109.21(d)(1). The second standard requires that the candidate, his or her committee, or their agents be materially involved in the content, dissemination, or timing of the communication. *See* 11 C.F.R. § 109.21(d)(2). The third standard requires that the communication be created, produced, or distributed after at least one substantial discussion about the communication between the person paying for the communication, or that person's employees or agents, and the candidate or his or her authorized committee, his or her opponent or opponent's authorized committee, a political party committee, or any of their agents. A "substantial discussion" includes informing the payor

⁸ The complaint does not address the common vendor and republication standards; moreover, the respondents affirmatively deny that they used a common vendor. *See* Emily's List Response ("EL Response"), at 2; CC Response, at 5.

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1 about the campaign's plans, projects, activities, or needs, or providing the payor with information
2 material to the communication. *See* 11 C.F.R. § 109.21(d)(3).

3 The complaint alleges that coordination took place through direct contacts between the
4 campaign and Emily's List. *See* Complaint, at 2. The complaint states that many Emily's List
5 "operatives" raised money for the Castor campaign and helped with publicity, finance and
6 research, such as gathering information on opponents' records, that one Emily's List employee
7 was dedicated to the Castor campaign and called the campaign daily, and that "numerous other
8 Castor employees were hired based on EMILY's List decisions." *See id.* Further, the complaint
9 alleges that the coordinated communications are evidenced by Castor's withdrawal of television
10 advertisements in Jacksonville, Orlando, and Gainesville as Emily's List began to run ads in
11 those markets. *See id.*, at 3. The complaint, thus, alleges that the Emily's List and Castor
12 advertising activities "are the 'functional equivalent' of one large purchase" and "buttress[] the
13 obvious coordination strategy between EMILY's List and the Castor Campaign." *See id.* Finally,
14 the complainant points to Castor's public "admissions" that Emily's List wrote her "over
15 \$650,000 worth of checks," helped her raise money, and provided advice and support to the
16 campaign, as an acknowledgement that her campaign had "substantial discussions" with Emily's
17 List, thereby constituting coordination. *See id.*, at 3-4.

18 However, the responses submitted by Emily's List and the Castor Committee provide
19 enough facts to sufficiently rebut the complaint. Emily's List, while acknowledging that it gave
20 support to the Castor campaign, claims that its internal policies and procedures ensured that no
21 coordination occurred. *See* EL Response, at 2. Emily's List explains that Women Vote!, a
22 project within Emily's List, handles advertising buys, and that the employees, volunteers, and
23 consultants who worked on the project were "barred, as a matter of policy, from interacting with
24 federal candidates, political party committees, or the agents of the foregoing. These employees,

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1 volunteers and consultants are also barred from interacting with others within EMILY's List
2 regarding specified candidates or officeholders." *See id.* Likewise, the Castor Committee denies
3 that it had any knowledge of or involvement with the Emily's List ads in that neither it nor any of
4 its agents discussed, suggested or assented to them. *See* Castor Committee Response, ("CC
5 Response"), at 4. The Castor Committee further states that it made its decisions about placing
6 and pulling ads based on information that television stations are required to make public "and not
7 based on any communications with or information from Emily's List." *See id.*, at 5; *see also* EL
8 Response, at 5. Lastly, the Castor Committee argues that the speech Castor gave thanking
9 Emily's List for its fundraising efforts does not demonstrate that a substantial discussion about
10 the ads occurred because no information material to the later-created ads was conveyed. *See* CC
11 Response, at 5.

12 In essence, Emily's List appears to suggest that there was a firewall between these two
13 groups of Emily's List workers in that it maintains that the staff assigned to work directly with
14 the Castor Committee had no discussions with the staff assigned to Florida Women Vote! about
15 the advertisements at issue and imparted no knowledge or information about the Castor
16 campaign to Florida Women Vote! staff. *See id.*, at 1-3. And the principal piece of information
17 that might otherwise cause us to doubt either the effectiveness or existence of the firewall – the
18 apparently uncontroverted fact that the Castor Committee went off the air in certain markets
19 when Emily's List went on – is adequately rebutted by the Castor Committee's assertion that it
20 made its decisions based on information that it did not obtain from Emily's List.

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1 On balance, available information does not provide a sufficient basis to investigate
2 whether the Respondents may have engaged in conduct that meets one or more of the first three
3 conduct standards.

4 **2. Former employee**

5 The complaint also alleges that coordination occurred through a former employee –
6 specifically, Castor's campaign manager, Deborah Reed, who "worked on other Emily's List
7 campaigns." *See* Complaint, at 2. The former employee conduct standard addresses a situation
8 where a former employee or independent contractor of a candidate committee is employed by the
9 payor of an alleged coordinated communication, that person provides or uses information about
10 the clearly identified candidate's campaign plans, projects, activities, or needs, and that
11 information is material to the creation, production, or distribution of the communication. *See*
12 11 C.F.R. § 109.21(d)(5). The complaint seems to allege the reverse situation – that coordination
13 occurred through Castor's campaign manager who previously had worked on other Emily's List-
14 endorsed campaigns. *See* Complaint, at 2. We agree with both Respondents that the former
15 employee conduct standard is not applicable here because it only covers conduct by a campaign
16 committee's former employee, not the conduct of a third-party former employee who later works
17 for a campaign committee, as the complaint alleges. Moreover, there is no information that Reed
18 or any former employee was involved in the creation, production, or distribution of the
19 advertisements at issue. Thus, the facts alleged do not provide a sufficient predicate to
20 investigate whether the former employee conduct standard is satisfied.

21 **D. Conclusion**

22 In short, the allegations set forth in the complaint are sufficiently rebutted by the
23 Respondents. Accordingly, this Office recommends that the Commission find no reason to

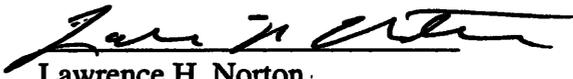
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1 believe that the Castor Committee or Emily's List violated the Act, and that the Commission
2 dismiss the complaint as to Florida Women Vote! – A Project of Emily's List.

3 **III. RECOMMENDATIONS**

- 4 1. Find no reason to believe that Emily's List and Britt Cocanour, in her official
5 capacity as treasurer, violated 2 U.S.C. § 441a by making excessive in-kind
6 contributions in the form of coordinated expenditures to Campaign for
7 Florida's Future, formerly known as Betty Castor for U.S. Senate, and
8 William R. Lewis, in his official capacity as treasurer.
9
10 2. Find no reason to believe that Campaign for Florida's Future, formerly known
11 as Betty Castor for U.S. Senate, and William R. Lewis, in his official capacity
12 as treasurer, violated 2 U.S.C. § 441a by knowingly receiving excessive in-
13 kind contributions in the form of coordinated expenditures.
14
15 3. Dismiss the complaint as to Florida Women Vote! – A Project of Emily's List.
16
17 4. Approve the appropriate letters.
18
19 5. Close the file.

20 8/9/05
21 Date

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24 General Counsel

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